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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of)
)
Amendment of Part 90 of the Commission's) PR Docket No. 93-144
Rules to Facilitate Future Development of) RM-8117, RM-8030
SMR Systems in the 800 MHz Frequency Band) RM-8029

and

Implementation of Section 309(j) of the)
Communications Act-Competitive Bidding) PP Docket No. 93-253
800 MHz SMR)

To: The Commission

MOTION TO DEFER AND
SUPPLEMENTAL COMMENTS

Brown and Schwaninger (hereinafter "We")¹ hereby moves the Commission to defer action on the above captioned matter insofar as the Commission has decided, subject to review arising out of future action on Petitions For Reconsideration pending in the instant matter, that future licensing of 800 MHz SMR channels shall be accomplished through use of the Commission's authority to employ competitive bidding procedures under Section 309(j) of the Communications Act of 1934, as amended (hereinafter referred to as "auctions").^{2 3 4}

¹ Brown and Schwaninger is a commenter in this proceeding in its own name and as the legal representative of many other commenting parties, accordingly, it is well positioned to bring the instant Motion.

² Nothing stated herein should be interpreted as the Firm's agreement that the agency's claim of authority under 47 U.S.C. §309(j), to employ competitive bidding procedures for the purpose of future licensing of wide-area ESMR systems, is appropriate for any purposes.

³ We request that the Commission process the instant Motion in accord its duties under 5 U.S.C. §553(e).

We hereby move that the Commission perform a cost/benefit analysis to determine whether use of auctions is in the public interest, convenience and necessity.⁵ The instant motion arises out of our receipt of information regarding the level of revenues generated by the Commission's auction of unserved cellular areas, which failed to raise even \$2 million after thirty five rounds of bidding. The receipt of such low revenues for cellular spectrum is a good indicator of what the Commission may expect to receive from any auction of 800 MHz SMR spectrum.

Like the SMR spectrum, the spectrum received by the high bidders in the cellular auction is also 800 MHz spectrum for use in the provision of two-way telecommunications services to the public. However, cellular licensees will not have the following duties (1) negotiation and performance under frequency migration proposals; (2) use of potentially incompatible equipment to perform roaming in conjuncture with other licensees; and (3) need to demonstrate the ability to engage in frequency migration based on high bidders' holding sufficient "trading stock" channels in other areas of the 800 MHz frequency band as a condition precedent to construction of a wide-area system across the area for which the license was awarded. In addition, the high

⁴ The instant Motion and associated comments herein have been filed outside of the mandated time for receipt of comments in this proceeding, however, the information which has precipitated the Motion and Supplemental Comments was unknown to movants, or even the agency, during the original comment period. To assure that all interested parties are put on notice as to the contents of the instant pleading, we have performed service to all such parties.

⁵ The Commission's treatment of the instant request would also apply to all related matters which rely, in some part, on the potential auction of 800 MHz channels, including without limitation, any action to be taken on the Commission's consideration of the alleged "consensus" proposal put forth by Nextel Communications, Inc., *et al.*

bidders in the cellular auction received authority to operate on three times the amount of spectrum which would be available via the sale of any proposed block of SMR channels. Finally, cellular licensees through auction will provide a service for which there is a demonstrable and quantifiable demand, unlike the speculative nature of ESMR wide-area systems which, to date, have not demonstrated the ability to generate a profit.

Despite the obvious advantages presented to cellular auction participants, including a ready market for future services, the bidders were still unwilling to bid more than \$2 million for all spectrum available across the entire United States. This is even more telling when one considers that the cellular auction did not require participants to have met conditions precedent, i.e. the previous licensing to a participant of other channels for migration purposes, to effect the construction of systems. Stated in another way, the cellular auction was truly open to the public, whereas the possible SMR auction is realistically only available to a handful of possible participants.

Based on the foregoing, the Commission can logically conclude that the possibility that the U.S. Treasury will reap many dollars from any auction of SMR channels, is quite low. In fact, the cellular auction demonstrates that the complaints lodged by many opponents to the SMR auction who pointed out that the disruption of the SMR industry to be caused by the auction cannot be justified based on expected revenues to be reaped by the U.S. Treasury, were very likely correct.


Although we are not aware of the Commission's costs in holding an SMR auction, one would expect that the total cost of receiving and prosecuting applications; creating a bidding procedures; administering the bidding process; prosecuting petitions arising out of unhappy participants; handling upfront payments and auction payments; and issuing licenses, would not be offset by the expected revenues to be garnered by the U.S. Treasury. These costs pale in comparison to the costs of administering the relocation of thousands of licensees and millions of customers who would be displaced by the holding of SMR auctions. In sum, the auction of SMR channels would be an economic loser for the federal government, adversely affected operators and consumers.

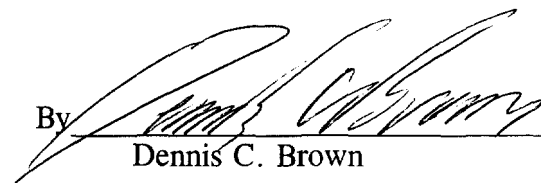
The grant of auction authority to the Commission by Congress was created, in part, for the purpose of assuring (when and if employed) that the United States public would receive a positive return on the licensing of spectrum to commercial operators when deciding among mutually exclusive applications. However, based on the best information now available, bidders' performance in the cellular auction, it is now clear that the federal government will lose money on any SMR auction. This being evident, it is incumbent on the Commission to determine whether, in light of this new information, use of the Commission's competitive bidding procedures is appropriate or justified in future licensing of SMR spectrum.

Based on the foregoing, we respectfully request that the Commission perform a cost/benefit analysis for the benefit of the United States public prior to rendering any further decision in this proceeding, to determine whether the intention of Congress in creating the competitive bidding procedures under 47 U.S.C. §309(j) would be met by any possible auction.

Respectfully submitted,

BROWN AND SCHWANINGER

By 
Robert H. Schwaninger, Jr.

By 
Dennis C. Brown

Dated: January 28, 1997

CERTIFICATE SERVICE

I hereby certify that on the twenty-eighth day of January, 1997, I served a copy of the foregoing Motion to Defer and Supplemental Comments on the following by placing a copy in the United States Mail, first class postage prepaid:

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